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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

JAMES SERVAIS; DOUGLAS PIERCE; WILLIAM R. DOBSON; ROGER NOLL; RITA NOLL; BYRON KRUEGER; MELVIN SCHMITZ; ROGER SWANSON,

Petitioners,

v.

KRAFT FOODS NORTH AMERICA, INC.; BORDEN CHEMICAL, INC.; LAND O'LAKES, INC.; NATIONAL CHEESE EXCHANGE, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF IN OPPOSITION

NATHANAEL M. COUSINS
CATHERINE FAZIO
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Attorneys for Kraft Foods North America, Inc.

TEFFT W. SMITH
Counsel of Record
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

[*additional counsel on inside cover*]

October 31, 2002

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RALPH V. TOPINKA
QUARLES & BRADY LLP
P.O. Box 2113
Madison, WI 53701
(608) 251-5000

THEODORE L. BANKS
SETH A. EISNER
KRAFT FOODS INC.
Three Lakes Drive
Northfield, IL 60093
(847) 646-3060

Attorneys for
Kraft Foods
North America, Inc.

G. MICHAEL HALFENGER
FOLEY & LARDNER
777 West Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

Attorney for National
Cheese Exchange, Inc.

THOMAS F. RYAN
BRUCE M. ZESSAR
GABRIEL AIZENBERG
SIDLEY AUSTIN BROWN &
WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

HOWARD A. POLLACK
GODFREY & KAHN, S.C.
780 North Water Street
Suite 1600
Milwaukee, WI 53202
(414) 273-3500

Attorneys for Borden
Chemical, Inc.

SCOTT W. HANSEN
CHRISTOPHER BANASZAK
REINHART, BOERNER, VAN
DEUREN, S.C.
1000 North Water Street
Milwaukee, WI 53202
(414) 298-1000

Attorneys for Land
O'Lakes, Inc.

STATEMENT PURSUANT TO RULE 29.6

Respondent Kraft Foods North America, Inc. (f/k/a Kraft Foods, Inc., and identified as such in the caption below), is wholly owned by Kraft Foods Inc., which is a publicly held company. Philip Morris Companies, Inc., a publicly held company, owns more than 10% of its stock.

Respondent Borden Chemical, Inc. (f/k/a Borden, Inc., and identified as such in the caption below), is a privately held company. It is majority-owned by Borden Holdings, Inc., which is also a privately held company.

Respondent Land O'Lakes, Inc. (successor in interest to Alpine Lace Brands, Inc., identified as such in the caption below), has no parent corporation, and no publicly held company owns more than 10% of its stock.

Respondent National Cheese Exchange, Inc., is a non-stock, non-profit corporation. It has no parent corporation, and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

Petitioners seek review of the Wisconsin Supreme Court's order summarily affirming the Wisconsin Court of Appeals' unanimous decision applying the filed rate doctrine to foreclose petitioners' claims. As a threshold matter, *certiorari* is inappropriate in this case because the Wisconsin Supreme Court's order gives no indication that the court adopted the *Wisconsin Court of Appeals'* reasoning, which petitioners are now challenging. Indeed, petitioners' primary argument before the Wisconsin Supreme Court was that the filed rate doctrine should not apply in this case *as a matter of state law, not federal law*. Even assuming that the Wisconsin Supreme Court adopted wholesale the reasoning of the Wisconsin Court of Appeals, however, nothing in that court's unremarkable application of the filed rate doctrine merits this Court's review. *Certiorari* should be denied.

COUNTERSTATEMENT OF THE CASE

This case involves the federal milk marketing system, a complex regulatory scheme established by the Agricultural Marketing Agreement Act of 1937 and administered by the United States Department of Agriculture (USDA) to promote orderly market conditions for the sale and supply of milk. *See* Pet. 8a.[1] The object of the federal milk marketing system is to fix minimum prices to be paid to milk producers by handlers and to ensure adequate milk supplies. *See id.* These milk marketing orders apply regionally. *See id.* Once a new milk marketing order is proposed, the USDA begins a rulemaking process in order to decide whether a milk marketing order is warranted at all, and, if so, whether the proposed order is appropriate. *See id.* at 9a. Before any order takes effect, it must receive approval from the dairy farmers in the

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[1] On August 7, 2001, the Wisconsin Court of Appeals issued an amended version of its opinion. Petitioners have attached the prior, superseded version of the court's opinion to their petition. Because none of the amendments affected portions of the opinion we cite in our brief, we, like petitioners, cite the superseded opinion. The amended version of the court's opinion can be found at 631 N.W.2d 629.

relevant region. *See id.* at 10a. A similar process exists to amend existing milk marketing orders. *See id.*

Petitioners are dairy farmers who claim to have been adversely affected by federal milk marketing orders establishing the minimum price in the regions in which they produce milk. *See id.* at 5a. They allege that three *cheese* producers—Kraft Foods, Inc. (now known as Kraft Foods North America, Inc.); Borden, Inc. (now known as respondent Borden Chemical, Inc.); and Alpine Lace Brands, Inc. (succeeded by respondent Land O'Lakes, Inc.)—manipulated the "minimum pay prices" contained in the applicable federal milk marketing orders by engaging in certain transactions on the National Cheese Exchange, an open market operated by respondent National Cheese Exchange, Inc. *See id.* at 5a-6a. Petitioners claim that respondents were able to manipulate the "minimum pay prices" contained in the federal milk marketing orders because the USDA based those prices, in part, on the price of cheese, which in turn was based, in part, on the reported price of cheese on the National Cheese Exchange. *See id.* at 9.

Petitioners brought suit against respondents under state (but not federal) antitrust law, seeking damages for the lower amount paid to them by handlers and co-ops as a result of the allegedly lower prices contained in the federal milk marketing orders. *See id.* at 5a-6a. After petitioners had a full opportunity for discovery, respondents moved for summary judgment in the trial court on the ground that petitioners' claims were foreclosed by the filed rate doctrine, which precludes suits for damages that are based on challenges to lawfully established rates. *See id.* at 6a-7a. The trial court granted respondents' motion for summary judgment. *See id.* at 6a.

The Wisconsin Court of Appeals unanimously affirmed. *See id.* at 3a-14a. The court reasoned that, "[t]o calculate the damages Servais claims to have sustained under these antitrust claims, * * *

a court would have to conclude that the USDA minimum pay price is not reasonable and to speculate what price the USDA would have set for milk orders if the alleged price manipulation at the National Cheese Exchange had not occurred." *Id.* at 12a. The court added that "such speculation would undermine a congressional scheme of uniform rate regulation and award as damages a dollar amount based on a new milk price never established by the USDA," *id.*, which, in turn, would require "substituting the judgment of a court as to what constitutes a reasonable minimum pay price for the judgment of the USDA," *id.* at 12a-13a.

The Wisconsin Supreme Court affirmed by an evenly divided court in a summary order. *See id.* at 1a-2a.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY THE PETITION ARE NOT PROPERLY BEFORE THIS COURT.

The sum total of the Wisconsin Supreme Court's reasoning in its summary order is a statement that "[t]he court is equally divided on the question of whether the decision of the court of appeals should be affirmed or reversed." Pet. 2a. Because the justices of the Wisconsin Supreme Court gave no indication of the reasoning for their votes to affirm, and because the Wisconsin Supreme Court may affirm a lower court on any ground supported by the record, *see, e.g.*, *Mueller v. Mizia*, 147 N.W.2d 269, 273 (Wis. 1967), it is simply impossible to say here whether the Wisconsin Supreme Court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," S. Ct. R. 10(b), or whether it "has decided an important federal question in a way that conflicts with relevant decisions of this Court," S. Ct. R. 10(c).

In apparent recognition of this vehicle problem, petitioners claim that "[a]ffirmance by an equally divided court in the opinion as to which petitioners seek a writ of certiorari is no bar to granting the

writ." Pet. 2 n.2. The cases that petitioners cite, however, are both inapposite. In *Conroy v. Aniskoff*, 507 U.S. 511 (1993), this Court considered whether members of the armed services must show that their military service prejudiced their ability to redeem title to property in order to qualify for a suspension of time to redeem under the Soldiers' and Sailors' Civil Relief Act. Although the Maine Supreme Judicial Court did affirm the decision below by an equally divided court, it expressly made clear in its order that it was equally divided *on the federal question that was presented to this Court*. *See Conroy v. Town of Danforth*, 599 A.2d 426, 427 (Me. 1991).

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court considered whether the test of *Strickland v. Washington*, 466 U.S. 668 (1984), applied to guilty-plea challenges based on ineffective assistance of counsel. In that case, the Court was reviewing an order of the *en banc* Eighth Circuit affirming the district court's decision by an equally divided court. The panel opinion, however, made clear that the ineffective-assistance issue ultimately decided by this Court was cleanly before the Eighth Circuit, and the affirmance by the equally divided *en banc* court therefore necessarily constituted a ruling on that issue. *See Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984).

The vehicle problem presented by the Wisconsin Supreme Court's summary order is only exacerbated by the fact that petitioners' primary argument before the Wisconsin Supreme Court was that the filed rate doctrine should not apply in this case *as a matter of state law, not federal law*. *See* Wis. S. Ct. Br. for Petrs. 14 ("I. The Applicability of the Filed Rate Doctrine Is Controlled by Wisconsin Law Not Federal Law."). It is therefore entirely possible that the justices of the Wisconsin Supreme Court who voted to affirm accepted petitioners' now-abandoned argument that the applicability of the filed rate doctrine was a matter of *state* law, but nevertheless affirmed on the alternative ground that the filed rate doctrine *did apply* as a matter of state law. If so, the

unstated reasoning of the Wisconsin Supreme Court would stand as an adequate and independent state ground barring this Court's review. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

For these reasons, petitioners' constant references to the "Wisconsin Decision"—that is, the decision of the Wisconsin Court of Appeals—and their constant requests that this Court overrule that "Decision" are ultimately irrelevant. The only decision before this Court on *certiorari*, of course, is the summary order of the Wisconsin Supreme Court. To the extent the Wisconsin Court of Appeals' decision implicates certworthy issues, this Court should await a case in which those issues are clearly before it.

II. THE LOWER COURT CORRECTLY APPLIED SETTLED LAW.

In any event, the decision of the Wisconsin Court of Appeals constitutes an unremarkable application of the filed rate doctrine and involves no certworthy issues. We address each of petitioners' questions presented in turn.

A. Petitioners first contend that the Wisconsin Court of Appeals erred by "assum[ing]," *see* Pet. 14, or "hold[ing]," *see id.* at 16, that the USDA's milk marketing order system preempts the field of milk marketing regulation, in conflict with this Court's decision in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and numerous lower-court decisions. *See* Pet. 16-20.

In its opinion, however, the Court of Appeals did no such thing. To the contrary, it expressly recognized that "[m]ilk marketing orders can also be established through state milk marketing systems," *id.* at 8a n.3, and concluded, citing *Florida Lime*, that "the federal government has *not* preempted the field for establishing milk orders," *id.* (emphasis added).

Notwithstanding this crystal-clear language, petitioners doggedly contend that the Wisconsin Court of Appeals must be presumed to

have concluded that there was field preemption because it "used classic field preemption language and analysis." *Id.* at 14. Again, however, petitioners mischaracterize the Court of Appeals' opinion. Although the court did refer to "a congressional scheme of uniform rate regulation," *id.* at 12a, it did not in any way suggest that the federal milk marketing orders in question set uniform rates *for the entire country*; instead, it implied only that the federal milk marketing orders set uniform rates *for the regions covered by the orders*, and did not foreclose the possibility that States could impose their own milk marketing orders. Petitioners' attempt to rewrite the Court of Appeals' opinion in order to manufacture a split should be rejected.

B. Petitioners next assert that the Wisconsin Court of Appeals erred by applying the federal filed rate doctrine in the absence of field preemption. *See* Pet. 20-25.

It is true that, as applied to state-law claims bearing on federal rates, the source of constitutional authority for the filed rate doctrine (as for federal preemption more generally) is the Supremacy Clause. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981). From that modest premise, however, it does not follow that field preemption is a prerequisite for application of the filed rate doctrine. The filed rate doctrine operates only to prevent state-law challenges to the *reasonableness* of federally established rates. *See Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951). It does not prevent States categorically from engaging in regulation of their own—provided, of course, that the regulation is not inconsistent with the federal regulatory scheme. Thus, in this case, the mere fact that States may be able to set their own minimum rates in some circumstances does not imply that States can authorize litigation that would effectively challenge the validity of federal rate *determinations*.

Moreover, if field preemption were a prerequisite for application of the filed rate doctrine, it would be impossible to square such a conclusion with those cases in which this Court has applied the filed rate doctrine to foreclose *federal* claims, where "preemption" by definition could not have occurred. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417-23 (1986); *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163-64 (1922).

It is unsurprising, therefore, that none of the four cases on which petitioners primarily rely stands for the proposition that field preemption is required in order to apply the filed rate doctrine. In *Nantahala Power*, this Court held that a state utility commission order allocating entitlement power in a manner inconsistent with that ordered by the Federal Energy Regulatory Commission was barred by the filed rate doctrine. *See* 476 U.S. at 967-73. In *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988), the Court held that a state utility commission could not, consistent with the filed rate doctrine, conduct proceedings to determine whether FERC-mandated payments for costs were "reasonably incurred operating expenses" for purposes of setting the utility's retail rates, *see id.* at 369-77. In *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), the Court did not address the filed rate doctrine at all, but instead merely held that a state-law action by a shipper injured by a common carrier's failure to provide adequate rail service was preempted by a federal agency's approval of the common carrier's decision to abandon service, *see id.* at 324-31. Finally, in *Arkansas Louisiana Gas*, the Court applied the filed rate doctrine to preclude a state action for damages resulting from the difference between a contract rate approved by a federal agency and a higher rate that plaintiffs alleged would have been approved by the agency if they had been informed of the relevant factual circumstances. *See* 453 U.S. at 576-84. None of these cases so much as refers to "field

preemption," much less engrafts a field-preemption requirement onto the filed rate doctrine.

C. Finally, petitioners assert that the Wisconsin Court of Appeals' decision is somehow inconsistent with USDA policy. *See* Pet. 25-27.

By their own admission, petitioners' argument boils down to an assertion that the "minimum prices [set by the USDA] do not result from the kind of regulatory discretion and subjective judgments of reasonableness that could form the basis for an application of the federal filed rate doctrine." *Id.* at 26. Whether or not the USDA exercises "regulatory discretion and subjective judgments of reasonableness" in setting minimum milk prices, petitioners allege no split of authority with regard to whether the filed rate doctrine is applicable in the context of federal milk marketing regulation, and petitioners have adduced no evidence to suggest that the USDA has ever disclaimed the applicability of the filed rate doctrine to their milk marketing orders. Moreover, to the extent that petitioners insinuate that the Wisconsin Court of Appeals' decision is inconsistent with federal policy more generally, both the Federal Trade Commission and the Commodity Futures Trading Commission have already investigated petitioners' claims and determined that there is no basis for further inquiry. *See* Wis. S. Ct. Resp. App. 154-56, 191-93. Petitioners' argument is therefore meritless.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

NATHANAEL M. COUSINS
CATHERINE FAZIO
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Attorneys for
Kraft Foods
North America, Inc.

TEFFT W. SMITH
Counsel of Record
KANNON K. SHANMUGAM
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

[*additional counsel*
on next page]

October 31, 2002

RALPH V. TOPINKA
QUARLES & BRADY LLP
P.O. Box 2113
Madison, WI 53701
(608) 251-5000

THEODORE L. BANKS
SETH A. EISNER
KRAFT FOODS INC.
Three Lakes Drive
Northfield, IL 60093
(847) 646-3060

Attorneys for
Kraft Foods
North America, Inc.

G. MICHAEL HALFENGER
FOLEY & LARDNER
777 West Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400

Attorney for National Cheese
Exchange, Inc.

THOMAS F. RYAN
BRUCE M. ZESSAR
GABRIEL AIZENBERG
SIDLEY AUSTIN BROWN &
WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

HOWARD A. POLLACK
GODFREY & KAHN, S.C.
780 North Water Street
Suite 1600
Milwaukee, WI 53202
(414) 273-3500

Attorneys for Borden
Chemical, Inc.

SCOTT W. HANSEN
CHRISTOPHER BANASZAK
REINHART, BOERNER, VAN
DEUREN, S.C.
1000 North Water Street
Milwaukee, WI 53202
(414) 298-1000

Attorneys for Land
O'Lakes, Inc.